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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. OSCAR ORTEGA, Defendant and Appellant.	B167613 (Los Angeles County Super. Ct. No. LA040441)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leland B. Harris, Judge. Affirmed in part, reversed in part, and remanded.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Herbert S. Tetef and Michael W. Whitaker, Deputy Attorneys General, for Plaintiff and Respondent.

Oscar Ortega appeals from the judgment entered following a jury trial that resulted in his conviction of attempted murder (Pen. Code, §§ 664/187, subd. (a); count 1)[1]; assault with a firearm (ADW) (§ 245, subd. (a)(2); counts 2-4, 6, & 7); and making criminal threats (§ 422; count 8), and findings that, as to counts 1 through 4, 6, and 7, he committed the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)); that, as to count 1, he personally discharged a firearm (§ 12022.53, subds. (c) & (e)(1)) and a principal personally used a firearm (§ 12022.53, subds. (b) & (e)(1)); and that, as to counts 2 through 4, and 6 through 8, he used a firearm (§ 12022.5, subd. (a)(1)).

He was sentenced to prison for 41 years and 8 months, consisting of a sentence on count 1 of the seven-year middle term, plus 20 years for the personal firearm use and 10 years for the criminal gang enhancement; consecutive sentences on each of counts 3, 4, 6 and 7, of one year (one-third the three-year middle term); and a consecutive sentence on count 8 of eight months (one-third the 24-month middle term). His sentence on count 2 of the three-year middle term, plus 10 years each for the gun use and the gang enhancements, was stayed (§ 654).

Appellant contends the trial court abused its discretion and violated his constitutional rights to a fair trial and to due process (U.S. Const., 5th, 6th & 14th Amends.) by allowing expert testimony on the ultimate issues of appellant's intent in committing the attempted murder (count 1) and the crimes which were alleged "for the benefit of, at the direction of, or in association with" a gang (§ 186.22, subd. (b)(1)). He contends reversal of his conviction for making criminal threats (count 8) is mandated, because the jury was erroneously instructed it is a general intent crime. He also contends the evidence is insufficient to support his criminal threats conviction.

By letter, we invited the parties to address whether: (1) the trial court erred in imposing the 10-year instead of the five-year gang enhancement on count 2; (2) the correct personal firearm use enhancement on counts 2 through 4, 6, and 7 was reflected in the recitals of the reporter's transcript or in the conflicting clerk's transcript; (3) the

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[1] All further section references are to the Penal Code unless otherwise indicated.

abstract of judgment must be amended to reflect the correct one; (4) the court committed reversible error in failing to select and impose a term for the personal firearm use enhancements on counts 3, 4, 6, and 7; and (5) the court committed reversible error by staying, instead of imposing or striking, the five-year gang enhancement (§ 186.22, subds. (b)(1)(B) & (g)) on each of counts 3, 4, 6, and 7. We have received their responses.

Based on our review of the record and applicable law, we reverse appellant's sentence and remand with directions which we shall specify. In all other respects, we affirm the judgment.

FACTUAL SUMMARY

We review the evidence in the light most favorable to the People and presume the existence of every fact the trier could reasonably deduce from the evidence that supports the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The following summary is based on this appellate standard of review.

There was an ongoing turf war between the Canoga Park Alabama gang (CPA) and the Brown Pride Surenos gang (BPS). BPS members referred to CPA members as "Kaka" while CPA members referred to their rivals as "Bean Pies." From the 1930's, the CPA gang controlled the 20300 block of Saticoy Street in Canoga Park. Recently, BPS moved into the area and controlled the 20339 Saticoy apartment building, known as the "Brown Pride Building."

On February 22, 2002, around 7:45 p.m., appellant, a BPS member whose moniker was "Goofey," approached Angie Esparza and Desiree, her pregnant daughter, in front of 20339 Saticoy, which was about two buildings away from where they lived. He asked Desiree if she had "went up to his sister and if [she] told her anything." Angie pulled Desiree away, but on their return from a store, appellant stated he was going to "bust a cap in" Desiree and her "Kaka baby." Desiree was frightened. She believed he meant he was going to shoot her and her unborn child. At the time, Desiree was four months

pregnant and the father was a CPA member, which was general knowledge. Angie filed a police report.

On March 20, 2002, Angie, Desiree, and Priscilla Esparza were crossing the street to return home when Ricardo Davila, Angie's son, and his friends Edgar Ramirez, "Jose," and "Manuel" joined them. After alerting his companions that people were exiting the 20339 Saticoy building, Manuel told everyone to run, which they did. Ricardo warned "they were going to shoot." Codefendant Edgar Chavez[2] shouted something about "Brown Pride" and pointed a gun at them. Ricardo heard five or six shots. Priscilla heard four to five shots.

Angie heard someone from among the four who exited the building yell out, "Brown Pride Surenos." As she lay on the sidewalk, she saw Chavez and appellant shooting at her. There were four to five shots, and the shots "whizz[ed]" by her head. She believed the shots were aimed at her and her children based on the earlier threat.

Desiree saw at least five individuals exit the 20339 Saticoy building and heard someone in the group yell, "Brown Pride" or "Brown Pride Surenos." Upon hearing a shot, she turned. She then heard two whooshing sounds near her stomach. These shots were fired from about 45 feet away. Chavez fired one of them, and appellant, who was next to him, fired the other.

On March 27, 2002, appellant and Julio Pisano, another BPS gang member, were in front of 20339 Saticoy when Los Angeles Police Officer Norman Peters ordered them to stop. They ran off. When he caught up with them, appellant admitted he was a BPS member and his moniker was "Goofey."

In photographic six-packs and at trial, Desiree and Angie identified appellant as one of the shooters and the one who had threatened to kill Desiree and her unborn baby.

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[2] Prior to the jury verdict, Chavez, who is not a party to this appeal, pled no contest to ADW (count 2) and admitted the firearm (§ 12022.5, subd. (a)) and gang (§ 186.22, subd. (b)(1)) allegations.

They also identified Chavez as a shooter. From a photographic six-pack, Edgar Ramirez identified appellant and Chavez as shooters, and Ricardo identified Chavez as a shooter.

Los Angeles County Sheriff's deputy Robert Farkas testified that BPS's primary criminal activities consisted of attempted murder, assault with a deadly weapon, robbery, grand theft auto, burglary, and narcotics. He described Armundo Chavez as a BPS gang member who had been convicted of attempted murder on April 2, 1999, and Steven Corral as a BPS member who suffered a burglary conviction on September 4, 2001.

Officer Peters testified that Phillip Charro, a BPS member, had suffered a grand theft conviction and Alex Rivas, another BPS member, had been convicted of two counts of second degree robbery.

Officer Peters further testified that gang members often would act together. He explained that they yell out their gang's name during the criminal acts both as an intimidation tactic, which serves to boost the gang's community status, and as a challenge to convey they are serious ("[W]e are going to shoot you. We're going to kill you"). He identified appellant as an admitted BPS member and described Chavez as a BPS "associate" or "affiliate." He opined that the shooting was for the benefit of, at the direction of, and in association with BPS, a criminal street gang.

Hilda Gutierrez, the sister of Maria Gutierrez, appellant's girlfriend, testified that she told appellant about an encounter with Desiree. Desiree stopped her on the street and asked if she were going to "get together with friends." When Hilda responded negatively, Desiree told her that Hilda would have problems if she hung out with people from "that building." Hilda testified it happened in February and believed the year was 2000 or 2002 but was not sure.

Appellant testified that he simply told Desiree not to threaten or have anything to do with "his girlfriend's sister." He never threatened Desiree. He denied that he spoke English and that he knew how to say in English that he was "'gonna bust a cap in [Desiree's] ass'" or that he was "'gonna kill her and her Kaka baby.'" He also denied knowing a Spanish translation for these words. Appellant further denied that he told the

police he was a gang member, that he went by the name "Goofey," and that he owned or ever used a gun.

Marisa Gutierrez, Maria's mother, testified that prior to moving to Oxnard in March 2002, she resided with her family at 20339 Saticoy. She testified that she never saw appellant with a weapon and he never indicated he was a gang member.

Appellant also relied on an alibi defense with regard to the March 20, 2002, shooting incident.

DISCUSSION

1. Gang Expert Testimony About "Ultimate Issue" Not Abuse

Appellant contends the trial court abused its discretion and violated his constitutional rights to a fair trial and to due process (U.S. Const., 5th, 6th & 14th Amends.) when the court erroneously allowed the People's gang expert to testify over objection regarding appellant's intent in committing the attempted murder of Desiree (count 1) (§§ 664/187, subd. (a)) and his intent to benefit a criminal street gang in committing the crimes charged in counts 1 through 4, 6 and 7 (§ 186.22, subd. (b)(1)). The record and applicable law do not support his contentions.

During a hearing (Evid. Code, § 402), codefendant Chavez's attorney, joined by appellant, objected to admission of gang expert testimony. He particularly objected to any officer "reaching an ultimate conclusion," because it would be "inappropriate for an expert" to give "a conclusion [on an] ultimate issue in this case." The trial court overruled the objections.

During direct testimony, Officer Peters, a gang expert, was asked: "Now, just as to [appellant], do you have an opinion as to why the [shooting] against [the victims] was committed?" He responded, "Yes."

He testified: "It was a gang-related crime in which the defendants[']] use of Brown Pride Putos [*sic*] while firing upon the victims, that was done to intimidate the victims, to challenge the victims and any association maybe to any other gangs. And to claim their turf, showing that we have taken over this spot and we are not going to [back] down.

And we're not going to be run out. And we're going to kill or hurt our opponents or anybody that gets in our way. And which benefits the gang."

Officer Peters opined "the crime was committed for the benefit of, at the direction of, and in association with the street gang, criminal street gang BPS." He further opined the shooting was committed with "the specific intent . . . to promote further and assist in the criminal conduct of that gang."

He explained his opinion was also based on "[t]he fact that with the number of other members claiming Brown Pride, it all indicates that they are claiming turf, challenging possibly rival gang members or intimidating the community."

Earlier in his testimony, Officer Peters explained that yelling out the gang name was "a challenge, to say okay, you know, we are going to shoot you. We're going to kill you. Letting people know that there is no doubt that it is some other gang's turf, but we are the ones doing it. And if you are tough enough, come, get us."

As we shall demonstrate, the trial court did not abuse its discretion, and thus, appellant's "derivative claims of federal constitutional error likewise must fail."[3] (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 84.)

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[3] Moreover, appellant concedes he did not object expressly on constitutional grounds. He therefore has forfeited his claim that admission of the gang expert's opinion on the issue of his intent violated his constitutional rights to a fair trial and due process. (*People v. Raley* (1992) 2 Cal.4th 870, 892 [constitutional claims regarding admissibility of evidence not cognizable on appeal absent timely objection on grounds urged]; see also *United States v. Olano* (1993) 507 U.S. 725, 731; but see *People v. Vera* (1997) 15 Cal.4th 269, 276-277.)

As appellant notes, however, the issue of forfeiture in the evidentiary context may be revisited by our Supreme Court in *People v. Partida* (Oct. 27, 2004, S127505), which involves these specific issues: "(1) Did defendant forfeit his federal due process claim on appeal by failing to object on that ground in the trial court? (2) Does the forfeiture exception articulated in *People v. Yeoman* (2003) 31 Cal.4th 93 . . . apply when the appellate claim is otherwise governed by Evidence Code section 353, subdivision (a)? (3) Did the admission of testimony from a gang expert violate either Evidence Code section 352 or federal due process?" (20 Cal.Rptr.3d 692.)

On the merits, we first conclude case law establishes the trial court did not abuse its discretion in allowing admission of Officer Peters's opinions on the gang allegations (§ 186.22, subd. (b)(1)) that the shooting was "for the benefit of, at the direction of, and in association with the . . . criminal street gang BPS," and it was committed with "the specific intent . . . to promote further and assist in the criminal conduct of that gang."

An expert's testimony which "embraces the ultimate issue to be decided by the trier of fact" generally is "not objectionable." (Evid. Code, § 805.) Specifically, in a gang-related case, an expert may testify regarding the ultimate issues raised by the gang allegations. (See, e.g., *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371; *People v. Gamez* (1991) 235 Cal.App.3d 957, 964-966.) In particular, case law has sanctioned expert testimony regarding "whether and how a crime was committed to benefit or promote a gang [citations]." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657.)

Appellant does not dispute the correctness of these statements of law. His position is that "it is still impermissible for an expert to express an opinion on the ultimate issue of a defendant's guilt or innocence," because an expert's opinion on that issue is "'wholly without value to the trier of fact in reaching a decision' . . . [Citations.]" He argues "the only opinion allowed is where an officer testifies about a generic gang member's 'expectation,' rather than a specific gang member's subjective intent. [Citation.] But that did not happen here."[4]

The record does not support appellant's claim that Officer Peters opined that *appellant* had the requisite mens rea to establish attempted murder, and thus, his count 1 conviction must be reversed. "Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.

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[4] In his reply brief, appellant apparently has abandoned the argument in his opening brief that sections 28 and 29 of the Evidence Code prohibited Officer Peters from rendering an opinion on the intent with which the shooting was committed. In any event, we note that these sections, which pertain to evidence of mental disease, mental illness, mental defect, or mental disorder, are factually inapplicable to this case.

[Citations.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623.) The record reflects the officer was never asked whether, and did not testify, *appellant* had the specific intent to kill. His testimony regarding "we're going to kill or hurt our opponents or anybody that gets in our way" was directed solely towards showing motive, i.e., why the shooting was gang-related, and to prove the gang allegation.

Rather, the jury was entitled to find appellant possessed the intent to kill based on his close proximity to Chavez, his fellow shooter, and the number of bullets fired, i.e., four or five. (See, e.g., *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224 [firing "at least six shots from a distance of about twenty-five feet" indicated a clear intent to kill].)

2. No Prejudicial Instructional Error Shown

Appellant contends his conviction for making criminal threats (§ 422; count 8) must be reversed, because the trial court misinstructed the jury that it was a general intent crime. We conclude the error was nonprejudicial.

"Section 20 provides, 'In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.' [Citation.] Intent can be either general or specific. 'When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.' [Citation.] General criminal intent thus requires no further mental state beyond willing commission of the act proscribed by law." (*People v. Sargent* (1999) 19 Cal.4th 1206, 1214-1215.)

Our Supreme Court has noted that "specific and general intent have been notoriously difficult terms to define." (*People v. Atkins* (2001) 25 Cal.4th 76, 82.) As we shall demonstrate, whether a violation of section 422 is a specific intent, as contrasted with a general intent crime is not the issue here. Rather, it is whether the court's instruction foreclosed the jury from finding all the requisite elements of that crime.

Initially, we point out the trial court did not instruct the jury that section 422 is a general intent crime. When read in context, the court's instructions, which we must view as a whole (*People v. Mayfield* (1997) 14 Cal.4th 668, 777), informed the jury that the crime of making criminal threats involves both general *and* specific intent on the part of the defendant.

The trial court gave CALJIC No. 3.30 (concurrence of act and criminal intent), which in pertinent part, provides that in the crime of making criminal threats, "there must exist a union or joint operation of act or conduct and general criminal intent. General intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful."

In addition, the court gave CALJIC No. 9.94 (2002 Re-revision), which, among other things, instructed the jury on the elements of the criminal threat crime essentially in the language of section 422. (See generally, *People v. Toledo* (2001) 26 Cal.4th 221, 227-228 [delineating elements of making criminal threats crime].)

In pertinent part, the jury was instructed that "[i]n order to prove this crime, each of the following elements must be proved: [¶] 1. A person *willfully* threatened to commit a crime which if committed would result in death or great bodily injury to another person; [and] [¶] 2. The person who made the threat did so with the *specific intent* that the statement be taken as a threat." (Italics added.)

In *People v. Solis* (2001) 90 Cal.App.4th 1002, this court concluded it was proper for the trial court to give "an instruction which essentially tracked the language of the statute (§ 422) prohibiting the making of a terrorist [now criminal] threat." (*Id.* at p. 1014; see generally, *People v. Poggi* (1988) 45 Cal.3d 306, 327 [statutory language defining crime "ordinarily sufficient when the defendant fails to request amplification" and "jury would have no difficulty in understanding the statute without guidance"]; *People v. Toledo, supra*, 26 Cal.4th at p. 224, fn. 1 [noting Legislature in 2000 redesignated crime of making a terrorist threat to making a criminal threat].)

We conclude the giving of CALJIC No. 3.30 on general intent was harmless. The trial court did not instruct that the jury could find appellant guilty of violating section 422 based on a finding of general intent alone, nor did the court instruct the jury to ignore the above two quoted elements if it found appellant acted with general intent.

Moreover, our review of the record does not disclose any confusion on the part of the jury regarding the requirement that the above two quoted elements must be met before the jury could find appellant guilty of making criminal threats (§ 422). We therefore presume the jury understood and adhered to the dictates of CALJIC No. 9.94, i.e., the jury found that appellant "*willfully* threatened to commit a crime which if committed would result in death or great bodily injury to another person" and that he "made the threat . . . with the *specific intent* that the statement be taken as a threat." (Italics added.) (See, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 662; *People v. Pinholster* (1992) 1 Cal.4th 865, 919.)

3. Ample Evidence Supports Criminal Threats Conviction

Appellant contends the evidence is insufficient to support his criminal threats conviction (count 8). We find the evidence is ample. (*People v. Butler* (2000) 85 Cal.App.4th 745, 752.)

In *People v. Toledo, supra*, our Supreme Court "made clear that not all threats are criminal and enumerated the elements necessary to prove the offense of making criminal threats under section 422. The prosecution must prove '(1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat--which may be "made verbally, in writing, or by means of an electronic communication device"--was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the

threatened person's fear was "reasonabl[e]" under the circumstances.' (*Toledo, supra*, 26 Cal.4th at pp. 227-228, citing *People v. Bolin* (1998) 18 Cal.4th 297, 337-340 & fn. 13.)" (*In re George T.* (2004) 33 Cal.4th 620, 630, fn. omitted.)

Appellant argues his threat to "bust a cap" in Desiree and her unborn "Kaka baby" did not violate section 422, because the threat was not unequivocal and unconditional; it did not convey "an immediate prospect of execution" and it did not cause Desiree's fear to be reasonable. The record establishes otherwise.

"A threat is sufficiently specific where it threatens death or great bodily injury. A threat is not insufficient simply because it does 'not communicate a time or precise manner of execution[;] section 422 does not require those details to be expressed.' [Citation.]" (*People v. Butler, supra*, 85 Cal.App.4th at p. 752.)

"To constitute a criminal threat, a communication need not be *absolutely* unequivocal, unconditional, immediate, and specific." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861, original italics.) Rather, "the test is whether, in light of the surrounding circumstances, the communication was *sufficiently* unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution. [Citation.]" (*Ibid.*, original italics.)

Contrary to appellant's claim, he did not make a conditional threat to Desiree that "'if she said something . . . he was gonna bust a cap in her ass and her Kaka baby, too.'" Desiree testified that appellant first asked if she had "went up to his sister and if I told her anything." Later, he told her that he was "gonna bust a cap in [her] and [her] Kaka baby." Desiree interpreted his threat to mean "he was gonna shoot [her]." Angie testified that appellant stood in front of Desiree and "started yelling at her about something. Then he told her that if she said something, that he was gonna bust a cap in her ass and her Kaka baby, too."

Moreover, prefacing the threat with the language "if she said something," does not render the threat conditional or equivocal. Not "'all threats involving an "if" clause'" are excluded from prosecution; rather what is prohibited is "'prosecution based on threats whose conditions precluded them from conveying a gravity of purpose and imminent

prospect of execution.' [Citations.]" (*People v. Bolin, supra*, 18 Cal.4th at p. 339; see generally, *Watts v. U.S.* (1969) 394 U.S. 705, 707-708; *U.S. v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1026-1027.)

Appellant also challenges the sufficiency of the evidence to sustain the finding that Desiree's fear was reasonable. He argues that it was unreasonable, because there was no evidence that "appellant said or did anything which led Desiree to believe he was anything but a friend before that date"; appellant was a gang member documented by the police; or Desiree was aware of any past violent conduct on his part.

We must consider appellant's threat in light of the surrounding circumstances under which it was made. Desiree's initial meeting with appellant prior to the threat was not a social encounter. Rather, there was an implicit gang related taint. A reasonable inference arises that Desiree believed appellant to be a gang member, because she knew appellant was called "Goofey" by his "homeboys."[5] Also, appellant confronted Desiree in front of 20339 Saticoy, which Desiree knew as the "Brown Pride Building," because BPS gang members lived there.

The making of the threat was similarly tainted. Upon their return to the same location, appellant, apparently still angry, threatened to shoot Desiree, who was four and a half months pregnant, and her unborn child, which he referred to as a "Kaka baby." Kaka is how BPS members referred to a member of their rival CPA gang. Desiree

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[5] Appellant argues "Desiree could not 'know' he was a gang member" on the day of the threat and "could only suspect he was," because the jury found not true the gang allegation regarding count 8 (§ 422). There is no cognizable nexus between what Desiree knew and the jury's finding. At most, the not true finding only supports an inference that the threat was not made for the benefit of, at the direction of, or in association with the gang. It does not give rise to an inference that appellant was not a gang member when the threat was uttered, nor does it have any bearing on what Desiree knew or did not know about appellant's gang membership. Moreover, it was enough that Desiree believed appellant was a BPS member.

identified her baby's father as a CPA gang member, a fact which was commonly known. The threat caused Desiree to be "scared" and "[t]o this day [she was] scared."

In view of these circumstances, the jury was entitled to infer that the threat carried a "gravity of purpose and imminent prospect of execution" and that Desiree was "reasonably . . . in sustained fear for [her] own safety or for [her] immediate family's safety." (§ 422) This inference is strengthened by appellant's subsequent act of firing his gun at Desiree. (See, e.g., *In re Ryan D., supra*, 100 Cal.App.4th at p. 860 ["Although an intent to carry out a threat is not required, the actions of the accused after making the communication may serve to give meaning to it"].)

4. Imposition of Personal Use Enhancements Mandated

The trial court selected count 1 (attempted murder) as the base term. It imposed the seven-year middle term, plus 20 years for the personal firearm use (§ 12022.53, subd. (a)(1)(18)(C)) and 10 years for the gang enhancement (§ 182.22, subd. (b)(1)(C)).

As to each of counts 2 through 4, 6, and 7, the jury convicted appellant of ADW (§ 245, subd. (a)(2)) and found true both the personal firearm use (§ 12022.5, subd. (a)(1)) and the gang (§ 186.22, subd. (b)(1)) allegations.[6]

The trial court stayed imposition of the personal firearm use and gang enhancements as to each of counts 3, 4, 6 and 7. This was reversible error.

Appellant argues "no enhancement should or could be imposed," because "the offense in count[s] 3, 4, 6 and 7 was assault **with a firearm**, [and thus] use of a firearm was an element of the offense." He is mistaken.

The personal firearm use enhancement applies "unless use of a firearm is an element of [the] offense." (§ 12022.5, subd. (a).) Nonetheless, at the time of the crimes in 2002, subdivision (d) of that section provided, in pertinent part: "[t]he additional term . . . may be imposed in cases of assault with a firearm under paragraph (2) of subdivision (a) of Section 245[, the crime at issue.]" (Former § 12022.5, subd. (d).) "[S]ubdivision

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[6] In his response, appellant acknowledges the trial court properly imposed the 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) on count 2.

(d) creates an exception to the proviso in subdivision (a) and renders imposition of a use enhancement *mandatory* for the enumerated offenses." (*People v. Ledesma* (1997) 16 Cal.4th 90, 97, italics added.)

Alternatively, appellant urges that the matter should be remanded to the trial court to select and impose a term for the personal use enhancement as to each of counts 3, 4, 6, and 7 and then stay execution of these enhancements pursuant to section 654.

Respondent agrees the matter should be remanded but argues that on remand, the trial court must either select and impose a term for the personal use enhancements or strike the personal use findings and state on the record its reasoning.

We conclude that remand for selection and imposition of a term on the personal use enhancements is necessary, but we disagree with the parties' remaining positions.

In light of the mandatory nature of section 12022.5, the multiple punishment bar of section 654 (assuming it encompasses enhancements; see *People v. Jones* (1993) 5 Cal.4th 1142, 1152), is inapplicable, and the trial court is without discretion to strike the personal use findings. (See, e.g., *People v. Herrera* (1998) 67 Cal.App.4th 987, 993-994 [§ 12022.5 use enhancement must be imposed, not stayed, and underlying finding may not be stricken under § 1385]; see *People v. Myers* (1997) 59 Cal.App.4th 1523, 1530-1533; see also *People v. Sanders* (2003) 111 Cal.App.4th 1371, 1375; § 12022.5, subd. (c) ["Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section"].)

Accordingly, the matter must be remanded with directions for the trial court: (1) to exercise its discretion in selecting the "additional and consecutive term of imprisonment" for this personal firearm use enhancement on each of counts 3, 4, 6, and 7 (§ 12022.5, subd. (a)); and to impose one-third of that term (§ 1170.1, subd. (a)) as to each.

5. Imposition of Gang Enhancements or Striking of Findings Mandated

As the parties acknowledge, the trial court erred in staying imposition of the gang enhancements on counts 3, 4, 6, and 7. The trial court did not indicate any reason why

the gang enhancements should not be imposed. A gang enhancement may be stricken but not stayed. "Notwithstanding any other law, the court *may strike* the additional punishment for the enhancements provided in this section . . . *in an unusual case where the interests of justice would best be served*." (§ 186.22, subd. (g), italics added.) Also, as this court explained in *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 711, "the trial court must either impose an enhancement or strike the underlying finding, [because it] is without authority simply to stay the enhancement."

The trial court is authorized to strike the additional punishment based on the interests of justice only "if the court specifies on the record [i.e., orally] and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition." (§ 186.22, subd. (g).)

In this instance, the trial court did not comply with subdivision (g) of section 186.22. The court did not strike the gang enhancements, nor did it orally or in its minutes describe the circumstances which identified this matter as "an unusual case where the interests of justice would best be served" by not imposing the enhancements.

The matter therefore also must be remanded for the trial court to exercise its discretion to impose or strike the above gang enhancement as to each of counts 3, 4, 6, and 7, and if it elects to strike the enhancement, to comply with section 186.22, subdivision (g).

6. Correction of Abstract of Judgment Warranted

Orally, the court stated: As to count 3, "[t]he finding [*sic*] as to 12022.5 and 186.22 . . . are ordered stayed"; as to count 4, "the sentence for 12022.5 and 186.22 be ordered stayed"; as to count 6, "ordered stayed [are] the penalties for 12022.5 and 186.22(b)(1)"; and as to count 7, "again ordered stayed the penalties for 12022.5 and 186.22, subdivision (b) subdivision (1) [*sic*]."

In the minutes, the court's order is reflected as follows: "Enhancements per section 12022.53(a)(1)(18)(c) [*sic*] Penal Code and 186.22(b)(1) Penal Code are ordered stayed as to count[s]" 3, 4, 6, and 7.

The record thus is unclear as to which personal firearm use enhancement, i.e., section 12022.5 or section 12022.53, the trial court was referring. We deem the reporter's transcript recital of section 12022.5 to be the correct record. It was only alleged and found true that appellant violated section 12022.5. The reference in the clerk's transcript to section 12022.53 therefore is an inadvertent error. (See, e.g., *People v. Smith* (1983) 33 Cal.3d 596, 599; *People v. Ritchie* (1971) 17 Cal.App.3d 1098, 1103-1104; *In re Evans* (1945) 70 Cal.App.2d 213, 216.)

The abstract of judgment, which followed the erroneous reference to section 12022.53 in the clerk's transcript, therefore must be corrected on remand, as the parties concede, to reflect the enhancements on counts 2, 3, 4, 6, and 7 are pursuant to section 12022.5, not to section 12022.53.

DISPOSITION

Appellant's sentence is reversed and the matter remanded with directions to conduct further proceedings consistent with this opinion. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.*

We concur:

EPSTEIN, P.J. HASTINGS, J.

***** Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.